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No. 1213

In the

Supreme Court of the United States

OCTOBER TERM, 1965

FRANK HORTON & COMPANY, INC.,

Respondent,

vs.

COOK ELECTRIC COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Cook Electric Company, respectfully prays that a Writ of Certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming a judgment of the District Court for the Northern District of Illinois.

THE OFFICIAL REPORTS

The Opinion of the Court of Appeals for the Seventh Circuit in this case is reported at 356 F.2d 485 (1966) and is here appended in accordance with Rule 23 1(a). The Opinion and Supplemental Opinion filed by the District Court for the Northern District of Illinois, are not reported. They appear in the record as printed for the

court below and filed herein, at pages A12 and A80, and reference thereto is made under the provisions of Rule 23 1(i).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Judgment of the Court of Appeals was entered January 27, 1966. Rehearing *en banc* was petitioned and denied March 7, 1966.

Jurisdiction of this Court is prayed under Section 1254(1), Title 28 of the United States Code and Rule 19 1(b) of this Court.

The Court of Appeals for the Seventh Circuit has rendered a decision in this case with respect to the introduction into evidence of self-serving testimonial memoranda which is unprecedented, and in conflict with recent decisions of the First and Fifth Circuits on the same matter.

The Court of Appeals for the Seventh Circuit in this case has established a new rule of evidence with respect to the admission of testimonial memoranda not admissible under the provisions of 28 U.S.C. 1732, nor under any rule of evidence heretofore applied in federal courts or in the courts of Illinois. The decision affects a fundamental question of federal procedure which has not been, and should now be, settled by this Court.

The decision rendered by the Court of Appeals conflicts with applicable decisions of this Court in so far as it approves opportunistic practices designed to frustrate and defeat the purposes of federal discovery procedures.

The decision rendered by the Court of Appeals in this case has so far departed from the accepted and

usual course of judicial proceedings and has sanctioned such departures by the District Court, as to constitute a denial of procedural due process of law to the petitioner as to call for an exercise of this Court's power of supervision.

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether testimonial memoranda which are neither admissible under the provisions of Rule 43, Federal Rules of Civil Procedure or 28 U.S.C. 1732, nor derived from documents or evidence which has been received in evidence, may be admitted as independent evidence.

2. Whether the Court of Appeals may enunciate an unprecedented rule of evidence while sitting as a reviewing court.

THE STATUTES WHICH THE CASE INVOLVES

Rule 43, Federal Rules of Civil Procedure:

> "(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

28 U.S.C. 1732(a)

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge of the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section includes business, profession, occupation, and calling of every kind."

STATEMENT OF THE CASE

Plaintiff, Frank Horton & Company, Inc., is a Missouri corporation. Defendant, Cook Electric Company, is a Delaware corporation having its principal place of business at Chicago, Illinois. Federal jurisdiction in the Court of first instance was based upon diversity of citizenship.

For its cause of action, plaintiff alleged that the defendant had unjustly cancelled an executory contract which agents of the defendant had previously made with plaintiff, causing the plaintiff to lose anticipated net profits in the amount of $186,040.35, and to suffer other damages. Plaintiff alleged that the contract between the parties could be found within several documents which were pleaded as exhibits to the complaint. (A. 3-6)

The defendant admitted the genuineness of the pleaded documents but denied that the documents constituted a contract between itself and the plaintiff; denied any breach of contract on its part; and denied that plaintiff had suffered any of the items of damage which were alleged in the complaint. (A. 6, 7)

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, the trial court ordered plaintiff to produce for inspection and copying by the defendant in advance of trial:

> "all books • • •, records • • • and all other documents upon which the claimed loss of profits of $186,040.35 as alleged in Paragraph 11, is based"

as well as other books, records and documents on which plaintiff intended to rely. (A. 8)

Plaintiff did not produce any "shop books", books of account, or other documents which would have been admissible into evidence under the provisions of 28 U.S.C. 1732 in support of its claim for loss of profits. However, the plaintiff did produce several memoranda which Mr. Frank Horton, plaintiff's president, and sole shareholder, had prepared shortly after the events giving rise to the law suit had occurred. (A. 291) Mr. Horton's memoranda included schedules which purported to show the number and types of construction personnel and equipment, and the anticipated wage and machinery expense which would have been incurred in the performance of the desired work. The schedules also included various other items such as operating expenses, moving time, pre-job expenses and other incidentals which Mr. Horton had assumed and used in computing an estimate of anticipated costs which plaintiff would have incurred had the petitioner sub-contracted the work to plaintiff.

The memoranda included a summary schedule in which Mr. Horton had computed plaintiff's net profits at $186,040.35, as alleged in the complaint, by deducting the costs so computed from the price at which he had offered to perform the work. (A. 455)

During pre-trial discovery, plaintiff represented that the original estimates and work papers which had been used in estimating the anticipated cost of performance and to prepare the bid to defendant had been destroyed immediately after the bid had been submitted. (A. 267) Mr. Horton's memoranda were represented as the only, and best, documentary evidence of plaintiff's anticipated costs and expenses. (A. 268)

Shortly after the memoranda were produced for pre-trial discovery, an adverse deposition was taken of Mr. Frank Horton on behalf of the defendant. Mr. Horton described how he estimated costs in preparing his bid, (A. 313-317) using the memoranda which he had prepared in November, 1960 to refresh his recollection. Mr. Horton testified that his memoranda were the best evidence then available of probable costs and expenses which would have been incurred by the plaintiff in the performance of the work. (A. 313) He refused to reveal further particulars regarding any actual figures which he might have used in his estimates of costs and bid to defendant. (A. 313)

All pre-trial discovery was completed during 1962. In January 1963, Mr. Horton and plaintiff's counsel met with defendant's president and its counsel in an attempt to negotiate a settlement of the case. At that time defendant's representatives revealed to Mr. Horton that Arthur Andersen & Company, certified public accountants, had been retained by the defendant to analyze Mr.

Horton's cost memoranda, and had found that Mr. Horton had failed to take into consideration the applicable Davis-Bacon Act wage rates which would have applied to the performance of the work, and had substantially under-estimated plaintiff's overhead expenses and payroll tax rates. Defendant's representatives advised that in attempting to arrive at a settlement amount they could not make any allowance for loss of anticipated profits, in that an analysis of Mr. Horton's memoranda by these independent accountants showed that plaintiff would have incurred an operating loss in the performance of the contract. No settlement was effected. (A. 276)

No issue was ever made by the plaintiff as to the accuracy of defendant's analysis of Mr. Horton's memoranda. On the contrary, Mr. Horton testified during trial that the position taken by the defendant at the settlement conference was justified on the basis of the material which plaintiff had furnished in the course of pre-trial discovery. (A. 276)

On March 20, 1963 plaintiff filed an Amended Complaint, stating its claim for loss of profits in the amount of $248,926.00. Although both parties had completed their pre-trial discovery substantially before the filing of the Amended Complaint, plaintiff neither disclosed nor offered to disclose the basis for this revision. (A. 9; 269)

Upon trial, plaintiff offered into evidence eight testimonial memoranda which had been prepared by Mr. Horton at some time following the January 1963 settlement conference. (A. 164; A. 205) These memoranda, which were identified as Plaintiff's Exhibits 54A, 54B, 55A, 55B, 56A, 56B, 57A and 57B, were of the same general nature as those which had been produced in accordance with the pre-trial discovery order. (A. 416-423) Most of the factors used in

plaintiff's Exhibits 54A through 57B, materially and obviously differed from those which Mr. Horton had used in his original estimate of anticipated construction costs. (A. 455)

On cross-examination, before admission of the documents, Mr. Horton admitted that plaintiff's Exhibits 54A through 57B had been prepared from memory solely to supply proof of the net profit which plaintiff would have made in the performance of the work, and acknowledged that plaintiff's Exhibits 54A through 57B were not based upon books and records prepared and kept in the regular course of business. (A. 206) He admitted that his memory of anticipated construction methods and anticipated costs was probably better in November 1960 at the time his original memoranda had been prepared. (A. 267)

Defendant objected to the admission of plaintiff's Exhibits 54A through 57B for lack of proper foundation, and on all of the following grounds: that the schedules were self-serving memoranda not prepared in the regular course of business nor based upon other books, records or documents so made or kept; that the documents were not admissible on a theory of Past Recollection Recorded; that the exhibits were substantially different from the schedules which the plaintiff had produced under pre-trial discovery order and on which defendant had relied in its preparation for trial. Each of the defendant's objections was overruled and the documents were received in lieu of Mr. Horton's testimony after he admitted he was unable to testify independently of the documents to his present recollection (A. 163), and after he had admitted that his estimates had been based, to a large extent, upon hearsay information furnished to him by others. (A. 205)

Plaintiff offered no evidence to support its claims for loss of anticipated profits apart from plaintiff's Exhibits 54A through 57B. If, as the petitioner contends, these documents were not admissible into evidence, it necessarily follows that plaintiff failed to sustain its burden of proof as to this issue.

Defendant offered evidence tending to prove that no profit would have resulted to the plaintiff from the performance of the work, and defendant introduced into evidence Mr. Horton's original memoranda, identified as Defendant's Exhibit 49, as an admission against interest. Defendant independently proved the Davis-Bacon wage rates which would have applied at the time and place of intended performance. (A. 506) Defendant also proved the percentage factors for overhead expense and payroll taxes which had been supplied by plaintiff's secretary and auditor during pre-trial discovery, as applicable to plaintiff's construction costs. (A. 288-289, 291) An expert accountant then testified that plaintiff would have incurred a net loss of approximately $1,000 had it undertaken to perform the contract work in the manner described in Mr. Horton's original memoranda, taking into consideration the applicable Davis-Bacon wage rates, and its established overhead and payroll tax expense. (A. 299)

The testimony of defendant's expert accounting witness was corroborated by the deposition testimony of Mr. H. P. Bartley who had been employed as field supervisor by Mr. Horton when Mr. Horton's bids to the defendant had been prepared. Mr. Bartley testified that he had personally estimated the anticipated *cost* of construction and that the documents which Mr. Horton identified as his "bids" had actually been transcribed from Mr. Bartley's cost estimates without increase or adjustments to provide for net profits.

(A. 305-311) On cross-examination Mr. Horton admitted that his bids to defendant were based upon Mr. Bartley's estimates. (A. 165)

On June 22, 1964, the trial court filed an extended Opinion, finding for the plaintiff on the issue of liability and awarding substantial damages to the plaintiff, including $175,917.84 as compensatory damages for loss of anticipated profits. The Opinion clearly shows that the trial judge computed plaintiff's anticipated profits on the basis of plaintiff's Exhibits 54A through 57B. (A. 12-55)

Defendant filed timely post trial motions pursuant to the provisions of Rules 59(a) and 59(e) in which it asked the trial court to reconsider the admissibility of plaintiff's Exhibits 54A through 57B. (A. 55, 61) All post trial motions were denied by the District Court, pursuant to a supplemental opinion filed December 2, 1964. (A. 80)

Petitioner then perfected an appeal to the Court of Appeals for the Seventh Circuit, presenting all issues which it now seeks to present to this Court, as well as other material issues which had been erroneously decided by the trial judge to the detriment and injury of the petitioner. On January 27, 1966, the Court of Appeals filed its Opinion, affirming the judgment of the trial court. Timely Petition for Rehearing En Banc was denied, without opinion, on March 7, 1966 (This Appendix, p. 14a).

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS CREATED A SUBSTANTIAL CONFLICT WITH RECENT DECISIONS OF THE FIRST AND FIFTH CIRCUITS ON THE SAME MATTER.

The Court of Appeals in the present case has approved the admission into evidence of self-serving testimonial memoranda, prepared by a party in interest, in lieu of independent oral testimony by the witness. Such opinion, directly and substantially conflicts with recent decisions of the Court of Appeals for the First Circuit and the Court of Appeals for the Fifth Circuit on the same issue.

In the case of *N.L.R.B., Petitioner* v. *Federal Dairy Co., Inc., Respondent,* 297 F.2d 487, 489 (1962), the Court of Appeals for the First Circuit expressly held that a witness was not entitled to place into evidence notes and memoranda which he had especially prepared for the purpose of testifying, over the timely objections of the opposing party.

Under the Rules of Evidence as enunciated by the First Circuit, the trial judge in this case would have been required to refuse to consider the self-serving memoranda which Mr. Horton had prepared for the admitted purpose of supporting plaintiff's claim for anticipated profits.

In the case of *Thompson* v. *United States,* 342 F. 2d 137, 140 (1965) Cert. Den. 381 U.S. 926, 85 Sup. Ct. 1560, the Court of Appeals for the Fifth Circuit concurred in the position taken by the Court of Appeals for the First Circuit, and ruled that the trial judge had an affirmative duty to prevent witnesses from putting into the

record the contents of otherwise inadmissible writings which the witnesses had especially prepared in the absence of original books and records.

The decision in the present case conflicts with the established rules of evidence as interpreted by both of these courts.

II.

THE COURT OF APPEALS HAS APPROVED THE USE OF TESTIMONIAL DOCUMENTS WHICH WERE NOT ADMISSIBLE INTO EVIDENCE UNDER THE PROVISIONS OF RULE 43, FEDERAL RULES OF CIVIL PROCEDURE.

The memoranda used by plaintiff to prove, and relied upon by the trial judge in computing plaintiff's damages, were not admissible under the provisions of 28 U.S.C. 1732 (a), or any other statute of the United States. Neither were they admissible as evidence under any rule "heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in courts of general jurisdiction" of the State of Illinois. This being so, Rule 43 of the Federal Rules of Civil Procedure required that the testimony of Mr. Horton "be taken orally in open court * * *."

The trial judge elected to receive into evidence, and to compute damages, on the basis of self-serving memoranda prepared by an interested party, even though the record clearly demonstrated that such memoranda had been manufactured, substantially after the events, for the express purpose of establishing a claim at a time when memory was no longer "fresh," long after all original records had been destroyed.

The vice of the admission of these documents is compounded by the fact that these memoranda differed substan-

tially from the cost and profit memoranda which had been produced by plaintiff during pre-trial discovery, in many material aspects, and admittedly had been prepared only after defendant at a pre-trial settlement conference had shown plaintiff that Mr. Horton's original memoranda would not support a claim for damages for loss of anticipated profits.

The opinions of the trial court and the Court of Appeals are remarkable in that both expressly recognized the "self-serving nature" of the documents in question. Both opinions also recognized that Mr. Horton's estimates had not been based upon, nor derived from, other books or records, or other evidence which of itself had been, or would have been, admissible under the established rules of evidence.

Neither opinion purports to explain or justify the clear violation of Rule 43 by the trial court.

III.

THE COURT OF APPEALS HAS ENUNCIATED A RULE OF EXPEDIENCY WHICH IS INCONSISTENT WITH DUE PROCESS OF LAW.

In approving the admission into evidence of Mr. Horton's cost memoranda, the Court of Appeals said:

> "Horton's calculations provided the best method of proving lost profits which could have been adopted." (This Appendix, p. 12a.)

The Court of Appeals has enunciated a subjective test for the admission of documentary evidence which constitutes a substantial departure from the rules of evidence which have been heretofore applied in United States courts. Petitioner submits that a "best methods rule" is incapable of logical and consistent application by trial judges, or for that matter, by reviewing courts.

A "best method rule" would effectively operate to repeal all other rules of evidence which, properly applied, have heretofore operated in insure regularity in the course of trial, and which have stood as an effective bulwark against manufactured evidence by either the opposing party or the trial judge. The trial of contested issues will become chaotic if courts are freed to admit self-serving documents, by finding that the testimonial exhibits simply constitute the "best method" of proof. The admissibility of testimonial memoranda will quickly come to depend upon the subjective views of each trial judge, and each case will be decided on an *ad hoc* basis. Under the rule stated by the Court of Appeals in this case the existing rules of evidence upon which parties and courts presently rely will have no further meaning in this Circuit.

IV.

THE ADMISSIBILITY OF DOCUMENTARY EVIDENCE IN FEDERAL TRIAL COURTS INVOLVES A FUNDAMENTAL QUESTION OF FEDERAL PROCEDURE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Substantial uncertainty as to the admissibility of documentary evidence in federal trial courts will necessarily result if the opinion of the Court of Appeals in the present case is permitted to stand in contravention of the decision of the First Circuit in the case of *N.L.R.B., Petitioner* v. *Federal Dairy Company, Inc., Respondent,* 297 F. 2d 487, 489 (1962) and of the decision of the Fifth Circuit in the case of *Thompson* v. *United States,* 342 F. 2d 137, 140 (1965), Cert. Den. 381 U.S. 926, 85 Sup. Ct. 1560.

The Court of Appeals has approved the deliberate substitution of self-serving testimonial memoranda for the direct oral testimony of a real party in interest. The Court of Appeals has sanctioned and approved a practice which

frustrates effective cross-examination, and which will result in fundamental and far reaching changes in federal trial procedure, contrary to the views expressed by this Court in *Palmer* v. *Hoffman,* 318 U.S. 109, 113, 63 Sup. Ct. 477, 480 (1943).

The uncertainty which has been thus created by the decision of the Court of Appeals for the Seventh Circuit makes it imperative that the issue be now considered by this Court, and a definitive decision handed down.

V.

THE DECISION OF THE COURT OF APPEALS IN THIS CASE CONSTITUTES A DENIAL OF PROCEDURAL DUE PROCESS OF LAW.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceeding in the present case as to deny due process of law to the petitioner and to call for an exercise of this Court's plenary powers of supervision.

The Court of Appeals, in a largely unprecedented Opinion, superficially disposed of all issues presented for review by petitioners' appeal and ignored or overlooked the relevant authorities upon which petitioner relied. In deciding every relevant issue against the contentions of the petitioner, the Court of Appeals misstated essential facts which were uncontradicted and incompletely quoted material documents contained in the record presented to it for review. None of the authorities cited by the Court of Appeals in support of its Opinion were relied upon by either party, either in the trial court or on appeal, nor do such authorities actually support the propositions of law to which they have been cited. The Court of Appeals ignored its true function as a

reviewing court, electing instead to affirm the trial court on a subjective and *ad hoc* basis.

The subjectivity of the Court of Appeals' Opinion is most apparent in that portion approving the admission into evidence of the self-serving memoranda on which the trial judge relied.

Due process of law required the Court of Appeals to review and decide the evidentiary questions presented on appeal in accordance with Rule 43 of the Federal Rules of Civil Procedure and 28 U.S.C. 1732. The Court of Appeals improperly departed from the accepted and usual course of judicial proceedings by approving the admission of self serving documents simply because it considered them to be the "best method" of proving plaintiff's contentions.

CONCLUSION

Because of the refusal of the Court of Appeals to grant Re-hearing petitioner is left with no alternative other than to present itself in this Court, and to request an exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 14965, 15019

SEPTEMBER TERM, 1965 JANUARY SESSION, 1966

FRANK HORTON & COMPANY, INC., *Plaintiff-Appellee,*
v.
COOK ELECTRIC COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 27, 1966

Before DUFFY, CASTLE, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Cook Electric Company, a Delaware corporation with its principal place of business in Illinois, appeals from a judgment against it in the amount of $215,758.76, growing out of a breach of contract action brought in the district court under diversity jurisdiction by Frank Horton & Company, Inc., a Missouri corporation. The plaintiff has filed a cross-appeal with respect to an element of damages.

The case was tried by the court without a jury. The facts as found by the district judge require considerable elaboration.

Frank Horton is the key figure in this lawsuit, both as an individual proprietor and as the controlling stockholder

of the corporation bearing his name. In 1938, Horton organized Frank Horton & Company, a proprietorship originally engaged in consulting engineering which later added telephone wire installation to its activities. About 1954 Horton's proprietorship began to engage in the installation of underground communication cable. A special cable plow was developed for that purpose, patented, and assigned to the proprietorship.

Cook Electric Company at all relevant times had a division located in the Washington, D.C. area, the Advanced Communication Engineering Division (ACE). Clarence K. Laubach was the general manager of ACE and a divisional vice president of Cook. James W. Olsen was the assistant general manager of ACE.

In November, 1959, Cook was preparing to bid on government contracts for the construction of communications systems at various Air Force missile sites, projects requiring the installation of many miles of underground cable. An ACE project engineer recommended that ACE consider Horton as a possible subcontractor for cable placement work. The engineer conducted a field examination of Horton's facilities in Lamar, Missouri, and reported that "the Horton organization" was capable of operating on a large scale. Horton thereafter met with Laubach and Olsen and at their request submitted bids for the cable-burying jobs at Forbes and Lowry Air Force bases. These bids were accepted and used by ACE, but Cook was unsuccessful in obtaining the prime contracts. During the discussion relating to the Forbes and Lowry projects, Horton informed Laubach and Olsen that he was in the process of forming a corporation to lay the cable at the missile sites should contracts be awarded.

Frank Horton & Company, Inc. was formed in February, 1960. The corporation had a stated capital of $1,000. Frank Horton became its president and owned ninety-six per cent of its stock. The corporation shared the same address with the proprietorship. It had no assets, its employees were former proprietorship employees, and it received all neces-

sary funds through loans from Horton. In substance, the corporation was formed to do cable placement work on government projects through equipment—leasing from Frank Horton.

The liaison between Horton and ACE continued after the unsuccessful Forbes and Lowry construction bids. In June, 1960, Horton submitted subcontract bids for the missile site jobs at Lincoln (Nebraska), Larson (Washington), and Beale (California) Air Force bases. The bids were based in part upon estimates received from Horton employees who visited the job sites. The proposals submitted were personally prepared by Horton. They included lump sum figures for each base, followed by itemizations indicating the method used in their computation.

Horton delivered the bids, totaling $1,080,191.40 for the Lincoln, Larson, and Beale projects, to ACE in Washington, D.C. where he met Laubach and Olsen. He again informed them that he intended to have the corporation do the work, using his personnel and leasing his cable-burying equipment.[1] At one point Olsen remarked that "that method probably would have some tax advantage."

Cook received the Lincoln, Larson, and Beale prime contracts in August, 1960, using Horton's bids in its own proposals. Olsen promptly assured Horton that he would be awarded the subcontracts. Subsequently, Horton received a letter from Olsen dated September 9, 1960, and addressed to "The Frank Horton Company . . . Attention: Mr. Frank Horton, President." The letter stated in part:

> This Letter of Intent is issued in anticipation of the execution of a definitive construction contract for cable placement and materials between the Cook Electric

[1] The corporation performed its first cable-burying operation in this manner in August, 1960. The work was performed at Forbes Air Force Base, with Laubach's knowledge, for another contractor. The work was short-lived, however. A jurisdictional labor dispute forced the cancellation of the corporation's subcontract.

Company, represented by . . . [ACE] and the Frank Horton Company pursuant to which the Contractor shall furnish certain construction services and materials as may be required, in accordance with previously accepted fixed price offers by ACE . . . relative to the missile intercommunication systems for the Larson, Lincoln and Beale complexes. . . .

• • • • •

It is contemplated that our contract with your Firm will be executed within 60 days. However, in order to meet the requirements of the time schedule, it is recognized that the necessary equipment readying and subsequent movement thereof to Site locations be taken at this time to insure prompt delivery of the cable construction services and materials in the amounts shown.

• • • • •

Union labor will be required on the job, and the Contractor will be required to guarantee such work with the International Brotherhood of Electrical Workers at both International and Local levels.

• • • • •

In accepting this Letter of Intent, it is understood that the Contractor is bound by the same terms and provisions governing ACE under Contract AF 30 (635)—19218.

• • • • •

Please indicate your acceptance of the above terms by reply letter. Good luck—it is nice to get going.

Horton indicated his acceptance of the letter of intent on September 13. His letter was written on the stationery of Frank Horton & Company, Inc., the first time such stationery had been used in communications between the parties. The letter was initialled by Horton on behalf of the corporation. It noted that preparation for the work had begun and that men and equipment were moving to the Beale and Larson sites.

Horton visited Laubach and Olsen at the ACE offices in Washington on September 19. There he was given a letter,

signed by Laubach as "Vice President, Cook Electric Company," reading in part:

> Your letter proposal dated 25 July 1960 for work involved in placement of buried and submarine cables on the Missile projects has been evaluated and is acceptable by Cook Electric Company subject to the following:
>
> 1. Your fixed price for performance of this work remains unchanged. We understand that the fixed prices for each project is: Lincoln, $521,146.20; Larson, $232,690.00; and Beale, $326,355.20.
>
> • • • • •
>
> The Cook Electric Company has used your price proposal in its preparation of the Larson, Lincoln and Beale Projects. We hereby wish to inform you that we shall contract with you according to the terms of this Letter Amendment to our Letter of Intent referenced above.
>
> It has been a pleasure working with you. Your efforts and expenditures of time and money in the preparation of your proposal is deemed to be good and sufficient consideration to support the statements contained herein.

Horton returned to his office in Missouri, where on September 23 he received a telegram from Laubach reciting the necessity of "firm local union agreements in writing . . . by 29 September . . . to meet USAF requirements by October 1." Horton, of course, was aware of the necessity of both international and local union agreements, and had already discussed the terms of a proposed agreement with a vice president of the International Brotherhood of Electrical Workers. He was not aware, however, of the urgency of such agreements.

Horton immediately set out in a frantic, nationwide quest to satisfy this obligation. While in Washington, D.C. in an effort to contact the president of the IBEW, he explained his predicament to Laubach. Laubach told him to "get the agreements as quickly as you can." Horton then visited the west coast and spoke to local union officials. On October 5,

he called Olsen from Texas, where he had just obtained the final draft of the international agreement.[2] Olsen commented that "it looks like you'll make it," and added that a telegram had been sent to Horton's office in Missouri on the previous day giving Horton ten days in which to secure the union agreements. The telegram, which had been prepared by Washington counsel for Cook, was addressed to "Mr. Frank Horton, Frank H. Horton & Company, Inc." and read in part:

> You are hereby notified that Frank Horton & Company, Inc. is in default under its agreement with Advanced Communications (ACE) Division of Cook Electric Company as evidenced by a Letter of Intent dated September 9, 1960, as amended by Letter of Amendment dated September 19, 1960, and an acceptance dated September 13, 1960; since company has not furnished firm local union agreements as requested by telegram of September 22, 1960.
>
> Unless within ten days from the date hereof Frank Horton & Co., Inc. can perform under such agreement by guaranteeing union work with IBEW at both international and local levels, which guarantee shall be evidenced by it securing, producing and delivering to ACE firm written local union agreements for the Beale, Larson and Lincoln areas within such time, any and all agreements between Frank Horton & Company, Inc. and ACE shall be terminated. . . .

Horton received the signature of the IBEW president on the international union agreement on October 7. By October 10, Horton also possessed commitments from the appropriate IBEW locals covering the Lincoln, Larson, and Beale projects. On the following day he presented the final two agreements to Olsen in Washington. Olsen remarked that "they meet our requirements. I am real glad that you got them." Horton returned to Missouri to proceed with the work.

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[2] The agreement required the formal approval of the IBEW president.

As the district judge commented, however, "strange transactions were transpiring" during the period when Horton was so frantically endeavoring to secure the union agreements. On September 30, Olsen informed an ACE project engineer that the plans had changed, that Horton would not get the Beale project. A few days later Cook's labor relations manager told an IBEW local representative that the R. C. Hughes Electric Company would get the cable placement contract at Lincoln Air Force Base. And on October 5, the same day on which Horton was informed that he had ten days to secure the union agreements, ACE and the R. C. Hughes Electric Company, Inc.,—Cable Construction Company exchanged telegraphic offer, letter of intent, and acceptance for the cable placement at the Lincoln, Larson, and Beale sites. The contract price stated in these communications was $216,039.40 less than that bid by plaintiff.

On the day after Olsen had been presented with the evidence of local union agreements by Horton, October 12, Olsen wired the IBEW locals requesting confirmation that the "Frank Horton Company" had secured full working agreements with them and had settled certain potential jurisdictional problems. Two replies were received, one of which reluctantly acknowledged the existence of an agreement. The second reply, from a different union representative than the one who had given a "letter of acceptance" to Horton, stated that "this office has not settled anything concerning the cable job."

On October 18, Horton received a wire from Cook's Washington attorneys purporting to cancel any agreements which may have existed between ACE and "Frank Horton and Company" for failure to comply with the October 4 telegram. Three days later, Horton received assurance from an IBEW official in Washington that his international and local union agreements were in order. Neither Horton's proprietorship nor his corporation was allowed to proceed with the work. This suit by the corporation followed.

The district court held that a legally binding contract had been entered between the defendant, Cook Electric Com-

pany, and Frank Horton & Company, Inc. The court also held that Cook had terminated the contract without just cause, and assessed damages.

Cook first challenges the district court's finding that it entered a contract with the plaintiff corporation. Cook contends that no definite offer and acceptance can be found, that all negotiations were preliminary to a later formal execution of an agreement. Secondly, Cook urges that no meeting of the minds occurred since it intended to contract with the Frank Horton proprietorship and not with a corporation bearing his name. These contentions must be rejected.

The evidence pointing to the existence of the essential elements of a contract has been stated. The letter of intent of September 9 from ACE contained all of the essential terms of a contract. It stated that the bids made by Horton on the Lincoln, Larson, and Beale projects had been accepted. It indicated the time, place, and manner of the work to be performed. The letter also incorporated by reference the terms of Cook's prime contract with the Government. The requirements of a performance bond and the employment of union labor were spelled out. Any possible confusion as to the agreed contract price was clarified by the letter handed to Horton on September 19.

Horton accepted the terms stated in the letter of September 9 and 19 by his reply letter of September 13, by his subsequent discussions with Laubach, and by his action in moving men and equipment to the job sites. It is true that the parties may have contemplated the execution of a formal agreement at a later date. But such fact does not render the earlier agreements mere negotiations where it is clear that the ultimate contract will be substantially based upon the terms then stated. *Borg-Warner Corp.* v. *Anchor Coupling Co.*, 16 Ill. 2d 234, 156 N.E.2d 513 (1958); *Priest* v. *Oehler*, 328 Mo. 590, 41 S.W.2d 783 (1931). We quote with approval a portion of the district judge's carefully considered opinion:

> The language of the letters, and the surrounding circumstances which were considered in interpreting the

language, clearly indicate that these things did not constitute mere inoperative steps in preliminary negotiation. The acceptance of the letter of intent evidenced a meeting of the minds as to all the substantive and essential terms of the relationship between the parties. The fact that defendant demanded the immediate commencement of performance is a strong indication that A.C.E. expected the letter of intent and acceptance thereof to become binding and effective immediately. Defendant certainly did not expect Horton to commence performance only upon a "hope" of obtaining a contract. Furthermore, the words "it is nice to get going" has an air of conclusiveness about it.

Cook's argument that no meeting of the minds occurred also runs contrary to undisputed facts found by the district court. Laubach and Olsen were informed on two occasions that the work would be performed by a corporation drawing upon Horton's proprietorship personnel and equipment. The letter of intent submitted by ACE was accepted by Horton on behalf of the corporation, and no objection was made. In addition, the October 4 notice of default drafted by counsel retained by Cook was addressed to the corporation and threatened the corporation with cancellation of the contract.

All the evidence in the record points to the conclusion that it made no difference to Cook what type of entity Horton chose to conduct the cable-burying operation. The imprecision with which many communications were directed to Horton does not suggest a contrary inference in view of the fact that Laubach and Olsen were aware of Horton's intentions and did nothing to dissuade him. The mere fact that no mention of a "meeting of the minds" or "party" issue was made at the time Cook attempted to cancel the agreement indicates that the legal distinction between the proprietorship and the corporation was irrelevant to Cook. *Cf., Rothweiler* v. *Callicott,* 322 S.W.2d 151 (Mo. App. 1959).

Cook's next argument is that its agent, Laubach, had no authority to bind it to a million dollar subcontract.[3] Laubach had no such express authority.[4] But we agree with the conclusion of the district court that Laubach had apparent authority to enter such contracts, and we again quote from the district judge's opinion:

> Laubach, the agent, was a Vice-President of Cook. He was also head of the A.C.E. Division, with offices in a city removed from the home office and other divisions of Cook. The purpose of A.C.E. was to specialize in and serve the communications industry. Cook on a number of occasions ratified Laubach's contracts on behalf of the corporation and did so without demanding that he not sign such contracts prior to receiving their approval. In effect, Cook acquiesced in Laubach's manner of dealing and thereby permitted him to hold himself out as a principal.

The only person senior to Laubach in regard to the construction of communications systems for missile bases was the president of Cook. In fact, Laubach signed the contract with the firms which replaced the Horton corporation on the Lincoln, Larson, and Beale jobs, and this contract does not appear to have been either discussed or formally ratified by Cook's board of directors. Under these circumstances, Cook is now estopped to deny the authority of its agent. *State ex rel. Massman* v. *Bland*, 355 Mo. 17, 194 S.W.2d 42, 46 (1946).

The defendant contends that it was justified in cancelling its agreement with Horton because the latter failed to produce satisfactory union agreements as required by the letter of intent and the notice of default. The letter of intent

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[3] It should be noted that Cook's failure to assign lack of authority as a reason for terminating the Horton contract and its failure to plead want of authority as an affirmative defense are indications of the tenuousness of its present position.

[4] Cook's board of directors expressly withdrew such authority from divisional vice presidents by a resolution adopted on October 6, 1959.

required Horton to "guarantee" the work with the IBEW at both local and international levels. Subsequently, Horton was requested to secure "firm local agreements," and, by the terms of the notice of default, was given ten days to comply. Aside from the question of whether the timing of the requests by ACE was reasonable, we think that Horton substantially complied with the requests.

The international union agreement obtained by Horton is unchallenged. The terms of that agreement virtually assured the successful negotiation of the local agreements. The constitution of the IBEW provides that any local agreement which conflicts with an international agreement may be set aside by the international. Secondly, Horton did secure "letters of assent" from two of the three local unions concerned and a "letter of acceptance" from the third. These letters themselves recognized the supremacy of the international agreement.

Cook's good faith in asserting the failure of the plaintiff to provide union agreements as the reason for its rescission of the contract is also open to question. As stated earlier, ACE made firm commitments to another subcontractor for the Larson, Lincoln, and Beale cableburying jobs only one day after it had given Horton ten days to secure the union agreements. The district court found that "A.C.E. clearly appears to have been attempting to get rid of plaintiff and have other subcontractors do the cable placement work at a lower price. The contention that Horton had failed to secure firm local agreements was an attempt by A.C.E., through its Washington, D.C. attorneys, to provide a legal basis for rescinding the contract." Cook has significantly failed to contest this statement.

Finally, Cook contends that the district court erred in its computation of damages. The court based its findings on the "benefit of the bargain" formula. Horton's accepted bids were used as the contract price. The sum of the expenses which would have been incurred in performing the contract and of the expenses which had actually been incurred pursuant to the contract was subtracted from this price to obtain the estimated lost profit. The actual expenses incurred

were then added to the estimated lost profit to arrive at the final damage figure. We think the formula chosen by the district judge was proper. 5 CORBIN, CONTRACTS 195 (1964).

Cook argues that in adopting this method, the court ignored a specific formula for the ascertainment of damages contained in Cook's prime contract with the Government, to which the subcontract was subject. The imposition of this formula, Cook says, would restrict the plaintiff's damages to its out-of-pocket expenses. But the provision cited by Cook in support of its argument applies only when the subcontractor "fails to perform" in accordance with the contract. Since the plaintiff was not in default under its contract, the provision cited by Cook has no relevance.

The court allowed $39,840.92 for out-of-pocket expenses. Cook has challenged individual items aggregating approximately $5,000. The district judge carefully considered the testimony of a former employee of the plaintiff and an accountant who testified for Cook. He then allowed certain expenses and disallowed others. His findings as to the expenses which were allowed are supported by the record.

The plaintiff's lost profit was set at $175,917.84. In arriving at this figure, the court considered a rough cost estimate prepared by Horton in November, 1960, a more detailed estimate also prepared by Horton in January, 1963, and Horton's own testimony. Cook argues that the detailed estimates should not have been admitted as the summaries of an expert because the estimates were self-serving and because Horton did not sufficiently explain the manner in which the work would have been performed. The court, however, expressly recognized the self-serving nature of the cost estimates. It adjusted the estimates upwards in many instances, and chose to credit Horton's calculations in other instances. Cook did not offer an expert on the lost profit issue, but cross-examined Horton extensively. In view of the nature of the work to be performed, we think that the district judge properly admitted Horton's cost memoranda. Horton's calculations provided the best method of proving lost profit which could have been adopted.

This brings us to a consideration of the question presented by the plaintiff's cross-appeal. The plaintiff contends that its claim for $25,076 as an out-of-pocket equipment rental expense should have been granted. The equipment referred to is the cable-burying machinery which was shipped to the Larson and Beale job sites pursuant to the defendant's request in its letter of intent. The district court did not allow this claim essentially because the plaintiff failed to prove that it paid anything for the use of the equipment or that it was legally obligated to do so.

The plaintiff did not establish that Frank Horton, the owner of the equipment, ever submitted a bill to Frank Horton & Company, Inc., the plaintiff, for the rental or lease of the equipment. Nor did the plaintiff establish that it either reimbursed Frank Horton for such rental or recognized an indebtedness to him on its books. Thus, no "actually incurred" equipment rental expense was proved.

The plaintiff argues that the absence of formal negotiations between Horton and his alter ego should not inure to the benefit of the defendant. The plaintiff says that since it complied with the defendant's request to ship the equipment, and since $25,076 was shown to be the fair rental value of the equipment, a claim in quantum meruit has been established. We do not agree. To establish such a claim it was necessary for the plaintiff to show either a benefit received by the defendant or a loss incurred by plaintiff. It is conceded that the equipment shipped to the Larson and Beale sites was never used. Thus the defendant received no benefit from the requested performance. And although the fair rental value for the equipment for a two month period,[5] $25,076, was not disputed, the plaintiff made no attempt to show that the equipment was in demand or that it would have been used on another job had the defendant

[5] The plaintiff attempted to show that the equipment was tied up in connection with the Beale and Larson projects from September 15 to November 15. The supporting freight billings ranged from September 22 to November 9, and the district court properly characterized the remainder of the evidence on this question as "unclear."

not requested it. To permit the plaintiff to recover such fair rental value absent a showing of actual expense or other detriment to the plaintiff would constitute a penalty rather than recompense.

In summary, our examination of the record in this case reveals no error in the findings embraced in the opinion filed by the district judge. Moreover, we are convinced that the judge applied the proper legal principles to the facts.

The judgment is affirmed.

Order entered Thursday, January 27, 1966, by the above Court, by Duffy, Castle and Swygert, Circuit Judges, affirming the judgment of the District Court with costs and interest in accordance with the opinion of said Court filed this day.

Order entered March 7, 1966, by the above Court by Hastings, Chief Judge, and Duffy, Schnackenberg, Knoch, Castle, Kiley and Swygert, Circuit Judges, denying defendant-appellant's petition for rehearing *en banc*.

Certificate of Kenneth J. Carrick, Clerk of the above Court, dated March 24, 1966, certifying that the above contains true copies of the opinion filed January 27, 1966, judgment entered January 27, 1966, and denial of petition for rehearing entered March 7, 1966, in said cause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1213

FRANK HORTON & COMPANY, INC.,
Respondent,

vs.

COOK ELECTRIC COMPANY,
Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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OPINION BELOW, JURISDICTION AND STATUTE INVOLVED.

The opinion below, jurisdictional requisites and statute involved are adequately set forth in the petition.

QUESTION PRESENTED.

The question presented by the petition is whether or not an exhibit, consisting of eight pages of calculations itemizing the cost of performance and projected profit under a certain contract, prepared by an expert witness who is available for cross-examination, may be admitted in evi-